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INTELLIGENCE IDENTITIES PROTECTION ACT OF 1981

OCTOBER 6 (legislative day, SEPTEMBER 9), 1981.—Ordered to be printed

Mr. DENTON, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 391]

The Committee on the Judiciary, to which was referred the bill (S. 391) to improve the intelligence system of the United States, and for other purposes, having considered the same, by a vote of 17 ayes and 1 vote of "present", reports favorably thereon with amendments and recommends that the bill (as amended) do pass.

PURPOSE

The purpose of S. 391 and its companion measure, H.R. 4, is to strengthen the intelligence capabilities of the United States by amending the National Security Act of 1947 to prohibit the unauthorized disclosure of information identifying certain United States intelligence officers, agents, informants and sources, and to direct the President to establish procedures to protect the secrecy of these intelligence relationships.

HISTORY OF THE BILL

In recent years, members of the House and Senate Intelligence Committees, along with other colleagues in the Congress, have become increasingly concerned about the systematic effort by a small group of Americans, including some former intelligence agency employees, to disclose the names of covert intelligence agents. Numerous proposals have been made in this Congress for a criminal statute to punish such disclosure of the identities of intelligence agents.

Senator Bentsen introduced identities protection proposals in the 94th and 95th Congresses but no action was taken. On October 17, 1979, Representative Boland, Chairman of the House Intelligence Committee, introduced H.R. 5615, the Intelligence Identities Protection Act,

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which was cosponsored by all other members of that Committee. Identical provisions were included in S. 2216, introduced on January 24 1980, as the Intelligence Reform Act of 1980, by Senator Moynihan. The bill was cosponsored by Senators Wallop, Jackson and Chafee of the Select Committee on Intelligence, by Senators Domenici, Nunn and Danforth, and later by Senators Hollings, Schmitt, Simpson and Armstrong.

Provisions for intelligence identities protection similar to Senator Bentsen's proposal were also contained in S. 2284, which was introduced on February 8, 1980, as the National Intelligence Act of 1980 by Senator Huddleston. An earlier version of this bill, S. 2525, introduced in the 95th Congress, also included provisions for intelligence identities protection.

Hearings on S. 2284 before the Select Committee on Intelligence began on February 21, 1980, and addressed among other issues the provisions for intelligence identities protection. The provisions of S. 2284 imposed criminal penalties for the disclosure of identities of intelligence agents by persons who had authorized access to such information.

S. 2284 was considered by the Select Committee on May 6 and 8, 1980, and the Committee decided to limit that bill to repeal of the Hughes-Ryan Amendment and congressional oversight provisions. At the meeting on May 8, the Committee decided to pursue intelligence identities protection using S. 2216 as the vehicle for further consideration of this issue, as proposed by Senator Chafee. The Committee held further hearings on June 24 and 25 which focused specifically on the intelligence identities protection provisions of S. 2216. Those hearings also considered other proposals on the seubject, including S. 191 introduced by Senator Bentsen on January 23, 1979. Senator Bentsen testified in favor of his proposal for penalizing exposure of CIA agents' identities by persons who had authorized access to such identities. Senator Simpson testified in support of Amendment No. 1682 to S. 1722 (the criminal code revision bill), which he introduced on March 6, 1980, and which proposed extending penalties similar to S. 2216 to disclosure of the identities of law enforcement agents and informants.

While some Administration witnesses reiterated their proposal of criminal penalties for disclosure of intelligence agents' identities by any person based on classified information, then Deputy CIA Director Carlucci testified that this proposal "could cover the most egregious cases, such as the disclosures by Covert Action Information Bulletin, * * * only if the use of criminal investigative techniques provided sufficient proof that the disclosures were based on classified information." Other witnesses expressed a wide range of views favoring and opposing the provisions of S. 2216.

In early July 1980, attacks against American embassy officials in Jamaica took place shortly after the disclosure of the names, addresses, phone numbers, and automobile license numbers of 15 alleged CIA officers. The disclosures were made by an editor of the Covert Action Information Bulletin at a press conference in Kingston, Jamaica.

The Select Committee on Intelligence met in closed session on July 22, 1980, to confer with representatives of the CIA and the De-

partment of Justice on ways to meet this problem. Committee staff were instructed to work with staff of the House Permanent Select Committee on Intelligence and the Administration to reach agreement on bill language that would resolve differences and facilitate prompt action. On July 25, 1980, the House Committee unanimously approved H.R. 5615, the Intelligence Identities Protection Act, with amendments.

The Select Committee met on July 29, 1980, to consider S. 2216. Senator Chafee offered an amendment in the nature of a substitute which differed from H.R. 5615, as approved by the House Committee, on only one issue. The House Committee had approved the following standard for criminal penalties if the disclosure of an agent's identity is made by a person who did not learn that identity as a result of having authorized access to classified information:

> Whoever, in the course of an effort to identify and expose covert agents with the entent to impair or impede the foreign intelligence activities of the United States, discloses, with the intent to impair or impede the foreign intelligence activities of the United States, to any individual not authorized to receive classified information, any information that identifies a covert agent knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined not more than $15,000 or imprisoned not more than three years, or both.

Based on Department of Justice testimony which suggested that the intent standard contained in the House version could well be interpreted as focusing on the political opinion of the accused, Senator Chafee proposed the following standard:

> Whoever, in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States, discloses any information that identifies an individual as a covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such individual and that the United States is taking affirmative measures to conceal such individual's classified intelligence relationship to the United States, shall be fined not more than $15,000 or imprisoned not more than three years, or both.

This language had the full support of CIA and the Justice Department. Senator Bayh proposed an amendment that included the following language:

> Whoever, in the course of a pattern of activities intended to impair or impede the foreign intelligence activities of the United States by identifying and exposing covert agents, discloses, with reason to believe that such disclosure would impair or impede the foreign intelligence activities of the United States, any information. * * *

After lengthy discussion, Senator Bayh's amendment was defeated 9 to 3 with one abstention. Two other amendments to Senator Chafee's substitute were then adopted unanimously by voice vote. An amendment offered by Senator Huddleston added a definition of "pattern of activities," and an amendment by Senator Bayh provided that it shall not be an offense under the bill for an individual to disclose information that solely identifies himself as a covert agent. Senator Chafee's substitute, as amended, was then adopted by a vote of 13 to 1, S. 2216, as amended by Senator Chafee's substitute, was approved by the Committee as the Intelligence Identities Protection Act of 1980, with a recommendation for favorable action.

On August 22, 1980, S. 2216, as reported by the Select Committee on Intelligence, was referred to the Committee on the Judiciary under the provisions of Senate Resolution 400 for a period not to exceed 20 days that the Senate was in session. The Committee held hearings on September 5, 1980, at which representatives of the Department of Justice, the Central Intelligence Agency, the Federal Bureau of Investigation, media organizations and civil liberties groups testified. Written statements were also solicited from law professors and constitutional scholars by Senator Edward M. Kennedy, the chairman of the Committee.

During the hearings, the Committee was told by Carter Administration witnesses (which included the Department of Justice and the CIA) and the bill's chief sponsor, Senator Chafee, that the bill was intended "to stop those engaged in the business of 'naming names'" and was not intended to apply to members of the press or others engaged in protected First Amendment activities. Opponents of the bill testified, however, that whatever the intent of the drafters of the bill, section 501(c) could be interpreted to criminalize activity protected by the First Amendment and that the bill was therefore unconstitutional.

On September 17, 1980, the Committee met to mark up S. 2216, as reported by the Select Committee, and amendments to this bill were adopted by the following votes:

(1) Amendment no. 1, amending the standard of section 501(c) by a vote of 10–6.

(2) Amendment no. 3, inserting a new section 502(e) by a vote of 8–6.

(3) Amendment no. 4A, exempting Peace Corps and the Agency for International Development from section 503 by a vote of 7–6.

(4) Amendment no. 5, providing procedures for expedited judicial determination of the constitutionality of the bill by a unanimous voice vote.

The Committee voted to report the bill, as amended, by a vote of 13 yeas to 0 nays. The Committee subsequently reported S. 2216 on September 24, 1980.

Senators Thurmond, Laxalt, Hatch, Dole and Simpson all expressed concern that the four substantive amendments adopted by the Judiciary Committee could "gut the effectiveness" of legislation which was "originally drafted to prevent the flagrant and intentional exposure of the identities of covert intelligence employees and agents by individuals whose only possible purpose in doing so was to destroy our nation's intelligence capabilities."

According to the rules of the Senate, S. 2216, as originally reported from the Select Committee on Intelligence, could now be brought to the floor for action, subject to floor amendments of the type that were attached to it by the Judiciary Committee. Although proponents of the bill made every effort to bring it to the floor, the promise of a lengthy filibuster by a few opponents resulted in repeated delays of floor action. The effect of these delays was that S. 2216 did not reach the floor of the Senate before the second session of the 96th Congress came to a close on October 3, 1980. In a final effort to bring floor action, Senator Chafee addressed the Chair as follows:

> Mr. President * * * I find it ironic that those who oppose this legislation for constitutional reasons, feeling it impinges upon the rights of free speech or a free press, will not let us, the elected representatives of the people, at least debate the legislation on the floor and take a vote. Let us have a discussion in the free marketplace! Let us have the competition of ideas and arrive at a decision.

After the convening of the 97th Congress, Senator Chafee and 19 other Senators introduced the Intelligence Identities Protection Act of 1981 (S. 391) on February 3, 1981. This bill was virtually the same as the version of S. 2216 which was reported from the Select Committee on Intelligence the year before by a vote of 13 to 1, the only difference being the numbering of paragraphs. S. 391 was referred to the Committee on the Judiciary where it was subsequently sent to the Subcommittee on Security and Terrorism for action.

On May 8, 1981, Senator Denton, Chairman of the Subcommittee on Security and Terrorism, held hearings on S. 391 at which representatives of the Department of Justice, the Central Intelligence Agency, the Association of Former Intelligence Officers, the Center for National Security Studies and the American Civil Liberties Union testified. By the time the hearings were held, S. 391 had over 40 cosponsors from both sides of the aisle.

On June 24, 1981, S. 391 was polled out of the Subcommittee on Security and Terrorism by a vote of 3 to 1 with 1 abstention. The majority of the Subcommittee voted to report out S. 391 to the full Judiciary Committee without amendment.

Position of the Administration

The Reagan Administration fully supported S. 391 as reported by the Subcommittee. During his testimony before the Subcommittee on May 8, 1981, William J. Casey, Director of Central Intelligence, testified:

> * * * this Administration believes that passage of the "Intelligence Identities Protection Act" is essential to the maintenance of a strong and effective intelligence apparatus. Enactment of this legislation is an important component of the Administration's effort to implement President Reagan's determination to enhance the Nation's intelligence capabilities.

Testifying at the same hearing, Mr. Richard K. Willard, Counsel to the Attorney General for Intelligence Policy, stated:

> * * * the Justice Department strongly supports the enactment of legislation that would provide additional criminal penalties for the unauthorized disclosure of the identities of the clandestine intelligence officers, agents, and sources who play such an essential role in this nation's foreign intelligence, counter-intelligence, and counter-terrorism efforts.

The Committee believes it is important to note, as well, that the Carter Administration also supported S. 2216 as reported by the Intelligence Committee last year. For example, in addition to public testimony on the subject, the Deputy Attorney General, Charles Renfrew, stated in a letter to the Intelligence Committee dated July 29, 1980, that with respect to the basic standard for criminal penalty if the disclosure of an agent's identity is made by a person who did not learn that identity as a result of having authorized access to classified information:

> This formulation substantially alleviates the constitutional and practical concerns expressed by the Justice Department with regard to earlier versions of this bill that included a requirement that prohibited disclosures be made with a specific "intent to impair or impede" U.S. intelligence activities.
>
> Because of the significance of this matter * * * it has been our view from the beginning that such legislation as is enacted must be fair, effective and enforceable. Our position has been and remains that the absence of an intent element in this legislation will accomplish this goal.

The committee believes that the bipartisan nature of Administration support for S. 391, and for its predecessor, S. 2216, is also reflected in the fact that S. 391 currently has over 40 co-sponsors from both sides of the aisle.

Committee Action

The Committee considered S. 391, as reported by the Subcommittee on Security and Terrorism, at a business meeting on October 6, 1981.

The bill, as introduced by Senator Chafee and as reported by the Subcommittee, was virtually identical to S. 2216 as it had been reported from the Senate Committee on Intelligence during the 96th Congress. S. 391 contained in section 601(c) a standard requiring that the disclosure must be "in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States." This standard is found in section 601(c) of H.R. 4 as passed by the House.

Senator Biden offered an amendment to strike this language and insert in its place the language as presently found in section 601(c) of the reported bill.

The vote was as follows:

FOR THE AMENDMENT	OPPOSED TO THE AMENDMENT
Senator Mathias	Senator Thurmond
Senator Specter	Senator Laxalt
Senator Biden	Senator Hatch
Senator Kennedy	Senator Dole
Senator Byrd	Senator Simpson
Senator Metzenbaum	Senator East
Senator DeConcini	Senator Grassley
Senator Leahy	Senator Denton
Senator Baucus	

Senator Heflin voted "present." The amendment carried.

Thereafter, Senator Baucus offered an amendment to specifically exclude from section 603(a) the Peace Corps as a designated department or agency to be designated by the President for the purposes of providing assistance in procedures for establishing cover for intelligence officers and employees.

The vote was as follows:

FOR THE AMENDMENT	OPPOSED TO THE AMENDMENT
Senator Mathias	Senator Thurmond
Senator Dole	Senator Laxalt
Senator Specter	Senator Hatch
Senator Biden	Senator Simpson
Senator Kennedy	Senator East
Senator Byrd	Senator Grassley
Senator Metzenbaum	Senator Denton
Senator DeConcini	
Senator Leahy	
Senator Baucus	
Senator Heflin	

The amendment carried.

As amended, S. 391 was ordered reported with seventeen members voting affirmatively and with a vote of "present" by Senator Heflin.

General Statement

The Committee considered and approved this bill because, in recent years, the United States intelligence community has been faced with an unprecedented problem in its attempt to fulfill its responsibilities. A small number of Americans, including some former intelligence agency employees, have been engaged in a systematic effort to destroy the ability of our intelligence agencies to operate clandestinely by disclosing the names of intelligence agents.

Foremost among them has been Philip Agee, two of whose books—"Dirty Work: The CIA in Western Europe" and "Dirty Work 2: The CIA in Africa"—have revealed the names of over 1,000 alleged

CIA officers. Louis Wolf, co-editor of the Covert Action Information Bulletin which contains a special section titled "Naming Names," claims that he has revealed the names of over 2,000 CIA officers in recent years.

In December 1975, Richard S. Welch, CIA Station Chief in Athens, Greece, was murdered in front of his home. His assassination occurred within a month of the time that he was identified as CIA Station Chief in the Athens Daily News. The information for this story came from Philip Agee's Counterspy magazine.

On July 4, 1980, an American Embassy official—Mr. Richard Kinsman—posted in Kingston, Jamaica, was the target of an assassination attempt following a published allegation that he was a CIA officer. Although Mr. Kinsman and his family were not injured in the attack, his house and grounds were extensively damaged by submachinegun fire and an explosive device. Less than 48 hours before the attack Louis Wolf had publicly alleged that Richard Kinsman and 14 other U.S. Embassy officials in Jamaica were working for the CIA. In addition to names, Wolf also provided the officials' addresses and telephone numbers, and the license plate numbers and colors of their automobiles. On July 7, 1980, another Embassy official named by Wolf was the target of an apparent assassination attempt.

Earlier this year, six Americans were expelled from Mozambique fololwing charges of engaging in espionage. These expulsions followed visits to that country by members of the Cuban Intelligence Service and the editors of the Covert Action Information Bulletin.

Over the years none of the people involved in perpetrating these incidents has been indicted under the espionage laws or any other law for these malicious disclosures. This is effective testimony for the proposition that, if these wanton disclosures are to be stopped, a specific new law is needed. Until a new law is passed, undercover work for the United States will continue to become ever less effective and ever more hazardous, while those doing harm to the United States by exposing American undercover agents will continue their activities without penalty.

The Committee addressed only the problems posed by the disclosure of undercover employees and agents of American intelligence. It specifically decided not to address itself to the wider problems posed by various kinds of disclosure of classified information. While deploring all "leaks" of classified intelligence information, the Committee decided to accomplish a single, narrow purpose; to punish the unauthorized disclosure of the identity of undercover employees or agents in certain circumstances. The Committee's focus is further defined and narrowed by its decision to protect the identities of undercover personnel only when the U.S. Government is taking affirmative measures to conceal them. Because of this focus, the Subcommittee decided to penalize disclosures undertaken for the purpose of identifying and exposing such agents, regardless of whether these disclosures were based on classified information. Thus, the Committee's action is not an affirmation of the value of classification in the abstract. Rather, it is a definitive affirmation that the U.S. Government is right to have undercover employees and agents for foreign intelligence purposes, that the Government is right to take measures to keep such under-

cover arrangements secret, and that anyone who engages in activities intended to thwart this legitimate activity by the fact of identification and exposure of the identities of such personnel should be punished.

The Committee seeks to penalize any person, regardless of his status, who engages in "an effort to identify and expose covert agents with the intent to impair or impede the foreign intelligence activities of the United States by the fact of such identification and exposure." In the Committee's view the First Amendment is not a license for allowing a private intelligence organization to operate under the label "press." The Committee is not seeking to penalize political opinion, or journalistic expression. Rather, the Committee believes that efforts to identify and expose covert agents with the intent to impair or impede the foreign intelligence activities of the United States would be neither political opinion nor journalism, but rather ought to be punishable as a felony.

Security considerations preclude confirming or denying the accuracy of specific attempts at identifying U.S. intelligence personnel. There have, however, been many such disclosures, and not all of them are wide of the mark. The destructive effects of these disclosures have been varied and wide-ranging.

Many of these disclosures can place intelligence personnel and their families in physical danger from terrorist or violence-prone organizations. As a result, the professional effectiveness of officers who have been compromised is substantially and some times irreparably damaged. They must reduce or break contact with sensitive covert sources and continued contact must be coupled with increased defensive measures that are inevitably more costly and time-consuming. Some officers must be removed from their assignments and returned from overseas at substantial cost, and years of irreplaceable area experience and linguistic skill are lost. Since the ability to reassign the compromised officer is impaired, the pool of experienced CIA officers who can serve abroad is being reduced. Replacement of officers thus compromised is difficult and, in some cases, impossible. Such disclosures also sensitize hostile security services to CIA presence and influence foreign population, making operations far more difficult.

In addition, relations with foreign sources of intelligence have been impaired. Sources have evidenced increased concern for their own safety. Some active sources, and individuals contemplating cooperation with the United States, have terminated or reduced their contact with our intelligence agencies. Others have questioned how the United States government can expect its friends to provide information in view of continuing disclosures that may jeopardize their careers, liberty and lives. The result of this has been a reduction of those very relationships which are vital to obtaining high-quality U.S. intelligence. These disclosures have contributed to a perception among foreign intelligence services that U.S. intelligence agencies are unable to preserve important confidences. This perception has led and may lead these services to undertake reviews of their liaison relationships, which have resulted in, and will result in, reduction of contact and reduced passage of information. In taking these actions in the past, some foreign services have explicitly cited disclosures of intelligence identities.

The Committee took note of the fact that the identities of American undercover intelligence personnel are not as well hidden as they might

be. Indeed part of the bill is designed to improve cover. But the Committee rejected the contention that the identities of imperfectly covered intelligence personnel are thereby part of the public record. They are not. Those seeking to learn them without the use of classified information must frequently engage in physical surveillance, in search of personnel records, in interviews with neighbors and former colleagues. Taken together, all of this amounts to a comprehensive counterintelligence effort. It may be true that one does not have to be or to have been an intelligence officer in order to learn and reveal the identities of American undercover agents. But in that case one must often behave as a counterintelligence officer, using systematic investigative techniques, against the United States. The Committee has decided that certain identities should be protected both against betrayal of classified information and against such self-appointed counterspies.

The Committee also supports the fact that S. 391 directs the President to establish procedures to ensure that departments and agencies of the U.S. government designated by the President to do so shall provide whatever assistance is necessary to establish and maintain effective cover for intelligence personnel. The Committee realized that the President has always had the power to order any part of the Executive Branch to provide effective cover. But the Committee is aware that intelligence officers have not been provided with credentials and working conditions indistinguishable from certain other departments. The President heretofore has not effectively exercised his power to cause executive departments to provide adequate cover. However, it is the plain intent of the bill that the President establish procedures which shall result in effective cover. However, consistent with United States Government policy since 1961, the Committee adopted an amendment to specifically exempt the Peace Corps from this mandate.

Findings

The Committee has concluded that it is absolutely essential for our nation to have intelligence information which is timely and accurate. Further, the Committee believes that informed policymaking by officials of the Executive and Legislative branches requires that the United States collect such intelligence from human sources, for that particular kind of intelligence provides insight into the intentions of foreign powers or terrorist organizations which is not available from other sources.

The United States can collect the vital human intelligence it needs only through the operations officers of its intelligence agencies. Without effective cover for U.S. intelligence officers abroad and without assurance of anonymity for intelligence sources, the United States cannot collect the human intelligence which it must have to conduct an effective foreign and national defense policy. Moreover, as the United States seeks to implement its foreign policy objectives, it requires in unusual and important situations the capability to use clandestine operators to complement its overt policy initiatives.

The programs of the United States for the collection of human intelligence have been severely impaired by the efforts of certain individuals to disclose the identities of our undercover intelligence officers and our sources of information. The loss of vital human intelligence which our policymakers need, the great cost to the American taxpayer of

replacing intelligence resources lost due to such disclosures, and the greatly increased risk of harm which continuing disclosures force intelligence officers and sources to endure, are the intolerable, direct results of the efforts of those individuals to disclose intelligence identities.

The Committee hereby makes the following findings:

(1) Successful and efficiently conducted foreign intelligence and counterintelligence activities are vital to the national security of the United States.

(2) Successful and efficient foreign intelligence and counterintelligence activities require concealment of relationships between components of the United States Government that carry out those activities and certain of their employees and sources of information and assistance.

(3) The disclosure of such relationships to unauthorized persons is detrimental to the successful and efficient conduct of foreign intelligence, counterintelligence, and counter-terrorism activities of the United States.

(4) Individuals who have a concealed relationship with foreign intelligence, counterintelligence, or counter-terrorism components of the United States Government may be exposed to physical danger if their identities are disclosed to unauthorized persons.

(5) Organizations of determined individuals may be able to identify and expose U.S. Government employees who have concealed intelligence relationships by means of standard espionage techniques without access to classified documents.

(6) Current law has proved inadequate to prevent such efforts.

(7) The policies, arrangements and procedures used by the Executive branch to provide for U.S. intelligence officers, agents and sources must be strengthened and fully supported.

Therefore, to improve intelligence efforts of the U.S. and to protect intelligence officers and sources from harm, the Committee reports S. 391 to the Senate with a recommendation for favorable action thereon.

Summary of Legislation

S. 391 makes criminal the disclosure of intelligence identities only in certain specified circumstances.

S. 391 applies to three well defined and limited classes of individuals. The first consists of those who have had authorized access to classified information identifying undercover operatives, or "covert agents," as they are defined by the bill. This class would include only those individuals—principally government workers or supervisory officials—who would have had a need to know the identity of an undercover officer or an agent. This class therefore includes only those who obtain or receive documents or information which name or directly identify covert agents in the course of their duties. It is their occupation of a position of trust which results in access to the identities of covert agents, and disclosures of the identities they learned in this fashion are the most heavily penalized by the bill.

The second class also encompasses individuals who have or have had access to classified information, but not necessarily that which explicitly identifies covert agents. For a member of this class, however, it must be shown that as a result of that access to classified information

he learned an intelligence identity. This class would include those in government whose jobs place them in a position to learn the identities of covert agents indirectly. Although the government need not be able to prove that individuals in this class have had officially approved access to the actual identities of covert agents, it must show that as a result of the position which they held they learned such identities. Within certain circles of government such circumstances are not uncommon. Since individuals in this class have also had positions of trust, they are believed by the Subcommittee to have a duty of care parallel to, but less than, that of individuals included in the first class. Thus, disclosures by the second class are penalized less severely than those of the first class but still more severely than the third class.

The third and last class of individuals affected by the bill are those who may have never had authorized access to classified information with its accompanying duty of care, but who in the course of an effort to identify and expose covert agents with the intent to impair or impede the foreign intelligence activities of the United States by the fact of such identification and exposure, discloses to any individual not authorized to receive classified information, any information that identifies an individual as a covert agent.

The Committee believes that the provisions of S. 391 have been considered and crafted with care. The principal thrust of this effort has been to make criminal those disclosures which clearly represent a conscious and pernicious effort to identify and expose agents with the intent to impair or impede the foreign intelligence activities of the United States by such actions.

It is the purpose of the Committee in carefully specifying the above class to thereby preclude the inference and exclude the possibility that casual discussion, political debate, the journalistic pursuit of a story on intelligence, or the disclosure of illegality or impropriety in government will be chilled by the enactment of the bill. Further, the bill also provides that no prosecutions for conspiracy, aiding or abetting or misprision in the commission of an offense by a member of any of the three classes of individuals affected by the bill can occur unless the individual accused also acts in the course of an effort to identify and expose covert agents with the intent to impair or impede the foreign intelligence activities of the United States by the fact of such identification and exposure. Those who "cause" a felony (aiders and abettors and accessories before the fact, as described in section 2 of Title 18 U.S.C.), those who fail to report a felony (misprisioners as described in section 4 of Title 18), or those who conspire (18 U.S.C., sec. 371) could be reached if they demonstrated the requisite effort and intent.

At the same time, the Committee also recognizes that there are other aspects of this problem of protection which require different solutions. One is the strengthening of cover itself. Although a full discussion of cover for intelligence operatives abroad is inappropriate in the context of this report, the Committee believes that the alias and other provisions for the concealment of intelligence operatives are not fully adequate. Accordingly, the Committee has included a provision requiring the President to promulgate procedures that will help to rectify this situation. These procedures are to ensure that intelligence cover arrangements are effective. They are to provide that departments and

agencies of governments with the exception of the Peace Corps designated by the President are to afford all appropriate assistance—determined by the President—to this end.

These procedures do not address the relationships between intelligence agencies and private organizations and institutions. Nor does this section stipulate which elements of government shall provide assistance or what that assistance must be. The bill requires only that the President of the United States review these questions and determine the appropriate interest of the United States. In so doing, the provision recognizes that it is the responsibility of the President to study these questions and order improvements which will result in the adequate provision of cover to undercover intelligence operatives.

The exemption of the Peace Corps from this provision reaffirms the twenty-year-old Executive Branch policy of complete separation of the Peace Corps from intelligence activities and assures that the cover-giving mandate could not be construed as in any way altering this essential policy. The rationale for barring the use of the Peace Corps for any intelligence purposes has been acknowledged by every President since the Peace Corps was created in 1961. This rationale is based on the vital importance of Peace Corps volunteers and staff being able to carry out their essential missions of building links between the United States and the people of developing countries at the grassroots level, of providing practical and humanitarian assistance on a voluntary basis, and of demonstrating through the personal commitment of the volunteers the interest of American citizens in the welfare of individuals in developing countries. Thus, to enable the Peace Corps to carry out these missions, it is, has been, and must continue to be completely and absolutely separated from all intelligence activities. As former Secretary of State Dean Rusk stated in his May 4, 1981, letter to Senators Denton and Biden:

> The Peace Corps, as conceived and maintained, expresses the idealism and humanity of the United States in its relations to other countries, particularly those of the Third World. More than 80,000 Americans, mainly young, have now served overseas, often under conditions of hardship, to help meet the need of Third World countries for skilled manpower.
>
> To permit the Peace Corps to be used as cover for United States intelligence would be inconsistent with this conception of the Peace Corps. If people in foreign countries thought it was being so used, whether their belief was true or false, foreign countries would not accept Peace Corps volunteers, and, equally important, many highly motivated Americans would not volunteer for Peace Corps service.

Nor does the Administration in any way take issue with the underlying purpose of this exception. In his July 15, 1981, letter to Peace Corps Director Loret Ruppe, CIA Director William Casey stated, "I can assure you that I have no intention of seeking to use the Peace Corps to provide cover for clandestine intelligence collection conducted by CIA personnel. I certainly do not intend to change the long-standing CIA policy barring such use of the Peace Corps, which is reflected in existing regulations."

To ensure the complete separation, as well as the appearance of complete separation, of the Peace Corps from intelligence activities,

and to help ensure the safety of Peace Corps volunteers and staff, certain related policies have been adopted. Thus, the Peace Corps specifically bars individuals with intelligence backgrounds from volunteer, employee, consultant, and overseas contractor positions with the Peace Corps. In addition to being barred under current Presidential policy directives from using Peace Corps volunteers as cover, the intelligence community is barred from contacting, questioning, or in any other way seeking to use volunteers as intelligence sources. Moreover, United States Government policy bars intelligence agencies themselves from employing or otherwise assigning former Peace Corps volunteers or staff until after the expiration of a substantial period of time from their last Peace Corps service.

As a result of the adoption of this amendment specifically excluding the Peace Corps from the provisions of section 603, the Committee bill continues with express Congressional sanction the long-standing national policy of complete and total separation of the Peace Corps from any intelligence activities.

Constitutionality of the Bill

The Committee, conscious of its special responsibility to protect the Constitutional rights of Americans, carefully weighed the Constitutional implications of S. 391. Although the courts will make their own determination of constitutionality, the Congress has a responsibility to make its best judgment. There appears to be little doubt as to the constitutionality of the criminal penalties in section 601 (a) and (b) for persons who disclose the identities of covert agents they learned as a result of having authorized access to classified information. While constitutional questions were raised in the hearings with respect to criminal penalties for the publication of covert agents' identities by persons who have not had that access, it is the conclusion of the Committee that section 601(c) as amended, which imposes such penalties in certain narrowly limited circumstances, does not infringe on freedom of speech and freedom of the press guaranteed by the Constitution.

The First Amendment states that "Congress shall make no law * * * abridging the freedom of speech, or of the press. * * *" In interpreting the First Amendment, Justice Holmes wrote:

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a crowded theatre and causing a panic. The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about substantive evils that Congress has a right to prevent.

Schenck v. *United States*, 249 U.S. 47 (1919).

In addition, the courts have held that a statute affecting speech or publication must not extend overbroadly. Legitimate legislative goals cannot, according to the Supreme Court, "be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Shelton* v. *Tucker*, 364 U.S. 478, 488 (1960); cf., *Elfbrandt* v. *Russell*, 384 U.S. 11, 19 (1966). The Court has also said:

> It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict

> or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has given way to other compelling needs of society.

Broadrick v. *Oklahoma*, 413 U.S. 601, 607 (1972).

These are the principles that have guided the Committee in considering the constitutionality of S. 391. The findings of the Committee have been spelled out clearly and the language of the bill has been framed insofar as possible to deal with a specific, serious harm in the circumstances where that harm is most likely to occur.

(A) DISCLOSURE NOT BASED ON CLASSIFIED INFORMATION

The Committee has taken into account the question of disclosure not based on classified information. Even though section 601(c) punishes disclosure that is not based on classified information, the government must prove that the information disclosed by the defendant identified an individual as a covert agent and that the defendant knew the information so identified such individual. The definition of "covert agent" is specifically limited to an individual whose identity as an intelligence agency employee "is classified information" and to agents, informants, and sources "whose intelligence relationship to the United States is classified information." In addition, the government must prove that, at the time of the disclosure, the defendant knew that the United States was taking affirmative measures to conceal such individual's classified intelligence relationship to the United States. There is also a defense if the United States had already "publicly acknowledged or revealed" that relationship. Taken together, these provisions ensure that criminal penalties can be imposed under section 601(c) only when the defendant has knowingly disclosed information that, in terms of its specificity, its sensitivity, and the effort expended to maintain its secrecy, is virtually the equivalent of classified information.

(B) SCOPE OF PROTECTED INFORMATION

Apart from the issue of classification, the Committee has carefully considered the definition of "covert agent" and has included only those identities which it has determined to be absolutely necessary to protect for reasons of imminent danger to life or significant interference with vital intelligence activities. Undercover officers and employees overseas may be in special danger when their identities are revealed, as recent events indicated. In addition, U.S. intelligence activities can be disrupted severely when the identity of an officer in the clandestine service is disclosed. Overseas agents and informants who are not United States citizens may expect instant retribution when their relationship to the United States is exposed. If they reside in the United States their relatives abroad may be endangered. In both instances, important sources of information or assistance may be denied by disclosure, and possible future sources may be less forthcoming, or unavailable.

Where the dangers are less, however, the Committee has sought to avoid inhibition on public criticism or debate concerning intelligence activities. Because the revelation of their relationship could expose them to immediate and serious danger, U.S. citizens who serve

as informants or sources are included in the "covert agent" definition if they reside and act outside the United States. However, the physical danger element is much less within the United States. Furthermore, U.S. citizens residing within the United States who assist intelligence agencies may be employees of colleges, churches, the media, or political organizations. The degree of involvement of these groups with intelligence agencies is a legitimate subject of national debate and intragroup discourse. Therefore, the definition includes U.S. citizens residing within the United States only if they are agents or informant of the foreign counterintelligence or foreign counterterrorism components of the FBI. As noted above, these individuals are exposed to special hazards.

The principal criterion adopted by the Subcommittee in framing the categories of the "covert agent" definition has been physical danger or a reasonable possibility thereof. As a result, the criminal penalties in section 601(c) apply only to disclosure of a narrow class of information that requires special protection not only to meet the needs of the United States for an effective intelligence service, but also to ensure the safety of individuals serving this nation in hazardous circumstances.

(C) COURSE OF CONDUCT REQUIREMENTS

The Committee has concluded that in addition to the narrow definition of "covert agent", and the provisions requiring the government to prove that the defendant knowingly disclosed virtually the equivalent of classified information, further provisions may be needed to ensure that the bill meets First Amendment requirements when criminal penalties are imposed on persons who do not disclose agent identities they learned as a result of having authorized access to classified information. Therefore, the Committee required additional proof that the disclosure was made "in the course of an effort to identify and expose covert agents with the intent to impair or impede the foreign intelligence activities of the United States by the fact of such identification and exposure." This standard reflects "a considered legislative judgment that a particular mode of expression" must give way "to other compelling needs of society," as the Supreme Court has described the constitutional test.

The record indicates that the harm this bill seeks to prevent is most likely to result from disclosure of covert agent's identity in such a course designed, first, to make an effort at identifying covert agents and, second, to expose such agents publicly. The gratuitous listing of agents' names in certain publications goes far beyond information that might contribute to informed public debate on foreign policy or foreign intelligence activities. That effort to identify U.S. intelligence officers and agents in countries throughout the world and to expose their identities repeatedly, time and time again, serves no legitimate purpose. Instead, it reflects a total disregard for the consequences that may jeopardize the lives and safety of individuals and damage the ability of the United States to safeguard the national defense and conduct an effective foreign policy.

The standard adopted in section 601(c) applies criminal penalties only in very limited circumstances to deter those who make it their business to ferret out and publish the identities of agents. At the same

time, it does not affect the First Amendment rights of those who disclose the identities of agents as an integral part of another enterprise such as news media reporting of intelligence failures or abuses, academic studies of U.S. government policies and programs, or a private organization's enforcement of its internal rules, provided it is not done so in the course of an effort to identify and expose such agents with the intent to impair or impede the foreign intelligence activities of the United States.

The Committee shares the objectives expressed last year by the Attorney General when he wrote to the Intelligence Committee to emphasize "the great importance" of this legislation:

> While we must welcome public debate about the roll of the intelligence community as well as other components of our government, the wanton and indiscriminate disclosure of the names and cover identities of covert agents serves no salutory purpose whatsoever. As public officials, we have a duty, consistent with our oath to uphold the Constitution, to show our support for the men and women of the United States intelligence service who perform duties on behalf of their country, often at great personal risk and sacrifice. (Letter from Benjamin J. Civiletti, Attorney General of the United States, to Chairman, Senate Select Committee on Intelligence. Hearings on S. 2216 before Select Committee on Intelligence, June 24, 25, 1980, at page 25.)

The Attorney General added that the legislation should carefully establish "effective prohibitions on egregious disclosures of identities of intelligence agents, while recognizing essential rights of free speech guaranteed to us all by the First Amendment and the important role played by the press in exposing the truth."

As the Attorney General advised, S. 2216 concentrated on "wanton and indiscriminate disclosure" where such activities serve "no salutory purpose whatsoever," and it drew a distinction between such "egregious disclosures" and other modes of publication so as to maintain and respect "the important role played by the press in exposing the truth." S. 391 does likewise.

The Committee also shares the views of Counsel to the Attorney General for Intelligence Policy, Richard K. Willard, when he stated in testimony before the Subcommittee on May 8, 1981:

> The First Amendment is not absolute, and we are confident that a carefully drafted bill such as S. 391 is constitutional. Congressional hearings over the past two years have well documented the serious harm to national defense caused by actions the statute is intended to prevent. When compared with the extremely limited burden on free speech, we believe that this serious harm justifies the proposed legislation.

Some believe deeply that any legislation punishing the publication of information about government activities would be unconstitutional. Others assert that the Constitution would allow punishing any unauthorized disclosure of a covert agent's identity, regardless of the circumstances. The Committee believes, however, that S. 391 strikes a proper and constitutional balance between the needs of a free society

for information that might contribute to informed debate on public policy issues and the compelling concerns of the men and women who serve our nation's intelligence agencies at great risk and sacrifice.

Section-by-Section Analysis

Section 601—Disclosure of Identities

Section 601 established three distinct criminal offenses for the intentional disclosure to unauthorized persons of information identifying covert agents. The distinction among the offenses is based on the defendant's authorized access to classified information, or lack thereof. The greater the degree of such access, the greater is the duty of trust assumed by the defendant and the greater the penalty for breach of such duty. In addition, the elements of proof are fewer against defendants with authorized access to classified information.

Section 601(a) applies to those individuals who have been given authorized access to classified information which identifies a covert agent. Such individuals, usually employees of the United States with the most sensitive security clearances, have undertaken a duty of nondisclosure of the nation's most sensitive secrets. It is appropriate, in the Committee's view, to impose severe penalties for the breach of this duty and to hold individuals in this category to stricter standards of liability. Therefore, an individual who has had authorized access to classified information identifying a covert agent would be subject to a fine of $50,000 or imprisonment for ten years, or both, if he—

> Intentionally discloses, to any individual not authorized to receive classified information, any information identifying such agent,
>
> Knowing that the information disclosed identifies such agent, and
>
> Knowing that the United States is taking affirmative measures to conceal the agent's intelligence relationship to the United States.

The word "intentionally" was carefully chosen to reflect the Committee's intent to require that the government prove the most exacting state of mind element in connection with section 601 offenses.

It should be evident, but the Committee wishes to make clear, that the words "identifies", "identifying", and "identity", which are used throughout section 601 are intended to connote a correct status as a covert agent. To identify someone incorrectly as a covert agent is not a crime under this bill.

The reference to "affirmative measures" is intended to confine the effect of the bill to relationships that are deliberately concealed by the United States. These "affirmative measures" could include the use of such techniques as, for example, the creation of a "cover" identity (a set of fictitious characteristics and relationships) to conceal the individual's true identity and relationship to an intelligence agency, the use of clandestine means of communication to conceal the individual's relationship with United States Government personnel, and the restricting of any mention of the individual's true identity or intelligence relationship to classified documents and channels. Proof of

knowledge that the United States is taking affirmative measures to conceal an intelligence relationship will depend upon the facts and circumstances of each case. It could be demonstrated by showing that the discloser's current or former employment or other relationship with the United States required or gave him such knowledge. It could also be demonstrated by statements made in connection with the disclosure or by previous statements evidencing such knowledge.

The mere fact that an intelligence relationship appears in a document which is classified does not constitute evidence that the United States is taking affirmative measures to conceal the relationship. For instance, the document could be classified because of other information it contains. Similarly, the fact that the United States has not publicly acknowledged or revealed the relationship does not by itself satisfy the "affirmative measures" required.

It also is to be emphasized that though the identity disclosed must be classified (see section 606(4)), the actual information disclosed need not be. For example, the phone number, address, or automobile license number of a CIA station chief is not classified information; the disclosure of such information in a manner which identifies the holder as the CIA station chief is an offense under the bill. However, the connection between the information disclosed and the correct identity of the covert agent must be direct, and the information must point at a particular individual.

Finally, in connection with section 601(a), it should be noted that the identity of a covert agent which is disclosed and which is the subject of the prosecution must be an identity to which the offender, through authorized access to classified information, was specifically given access.

Section 601(b) applies to those who learn the identity of a covert agent "as a result of having authorized access to classified information." Basically, it covers those whose security clearance places them in a position from which the identity of a covert agent becomes known or is made known. The distinction between this category of offenders and the category covered by section 601(a), is under section 601(a) the offender must have had authorized access to specific classified information which identifies the covert agent whose disclosure is the basis for the prosecution. Section 601(b), on the other hand, requires that the identity be learned only "as a result" of authorized access to classified information in general.

As with those covered by section 601(a), those in 601(b) category have placed themselves in a special position of trust vis-a-vis the United States Government. Therefore, it is proper to levy stiffer penalties and require fewer elements to be proved than for those who have never had any authorized access to classified information (see section 601(c)). However, the Committee recognizes that there is a subtle but significant difference in the position of trust assumed between an offender within the section 601(a) category and an offender in the section 601(b) category. Therefore, the penalty for a conviction under section 601(b) is a fine of $25,000 or five years imprisonment, or both.

With the two exceptions discussed above—the relationship of the offender to classified information and the penalty for conviction—the two offenses, and the elements of proof thereof are the same.

Section 601(c) applies to any person who discloses the identity of a covert agent.

As is required by subsections (a) and (b), the government must prove that the disclosure was intentional and that the relationship disclosed was classified. The government must also prove that the offender knew that the government was taking affirmative measures to conceal the classified intelligence relationship of the covert agent. As is also the case with subsections (a) and (b), the actual information disclosed does not have to be classified. However, the government must prove that the defendant knew that he was disclosing a classified relationship the government seeks to conceal by affirmative measures.

Unlike the previous two sections, authorized access to classified information is not a prerequisite to a conviction under section 601(c). An offender under this section has not voluntarily agreed to protect any government information nor is he necessarily in a position of trust. Therefore, section 601(c) establishes elements of proof not found in sections 601 (a) or (b). The United States must prove—

> That the disclosure was made in the course of an effort to identify and expose covert agents;
>
> That the effort was undertaken with the intent to impair or impede the foreign intelligence activities of the United States by the fact of such identification and exposure.

To meet the standard of the bill, a discloser must be engaged in a purposeful enterprise of revealing names—he must, in short, be in the busines of "naming names." Not only has the crime been narrowly drawn in S. 391, but the Committee believes that a number of "hurdles" have been erected against prosecution to protect the journalist and intelligence critic. For example, in a prosecution, the Government would have to prove each of the following elements beyond a reasonable doubt:

> First, that there was an intentional disclosure of information which did in fact identify a "covert agent";
>
> Second, that the disclosure was made to an individual not authorized to receive classified information;
>
> Third, that the person who made the disclosure knew that the information disclosed did in fact identify and disclose a covert agent;
>
> Fourth, that the person who made the disclosure knew that the United States was taking affirmative measures to conceal the covert agent's classified intelligence affiliation;
>
> Fifth, that the disclosure was made in the course of an effort to identify and expose covert agents; and
>
> Sixth, that the person making the disclosure did so with the intent of impairing or impeding the foreign intelligence activities of the United States.

The bill requires that the government prove that the defendant engaged in an effort to identify and to expose a covert agent.

The process of identifying covert agents must involve a substantial effort to ferret out names which the government is seeking to keep secret. This process of identifying names must involve much more than merely restating that which is in the public domain. The process of

uncovering names includes techniques such as: (1) seeking unauthorized access to classified information, (2) a comprehensive counterintelligence effort by engaging in physical surveillance, electronic surveillance abroad and other techniques of espionage directed at undercover intelligence employees, or (3) systematically collecting, collating and analyzing information from multiple documentary sources for the purpose of identifying the names of agents.

The process of exposing covert agents must involve the deliberate exposure of names, the intentional "blowing of cover" designed to neutralize a covert agent or to damage an intelligence agency's ability to carry out its functions.

CIA

A newspaper reporter, then, would rarely have engaged in an effort with the requisite intent "to impair or impede the foreign intelligence activities of the United States by the fact of such identification and exposure." Instead, such a result would ordinarily be "the (anticipated) side effect of his conduct."

A journalist writing stories about the CIA would not be engaged in the requisite effort even if the stories he wrote included the names of one or more covert agents, unless the government proved that there was intent to identify and expose agents and that this effort was undertaken with intent to impair and expose foreign intelligence activities. The fact that a journalist had written articles critical of the CIA which did not identify covert agents could not be used as evidence that the purpose was to identify and expose covert agents. To meet the standard of the bill, a discloser must be engaged in a purposeful enterprise of revealing names—he must, in short, be in the business of "naming names."

The following are illustrations of activities which would not be covered:

An effort by a newspaper to uncover CIA connections with it, including learning the names of its employees who worked for the CIA.

An effort by a university or a church to learn if any of its employees had worked for the CIA. (These are activities intended to enforce the internal rules of the organization and not identify and expose CIA agents.)

An investigation by a newspaper of possible CIA connections with the Watergate burglaries. (This would be an activity undertaken to learn about the connections with the burglaries and not to identify and expose CIA agents.)

An investigation by a scholar or a reporter of the Phoenix program in Vietnam. (This would be an activity intended to investigate a controversial program and not to reveal names.)

The effect of the amendment on Sec. 601(c) is to establish firmly that, assuming the other elements are proved, a defendant in a 601(c) prosecution should be found guilty if, after an effort to learn and expose the identities of covert agents for the purpose of obstructing intelligence activities or recruiting assets by the fact of such identification and exposure, he discloses information making their association with U.S. intelligence public. If the government fails to establish to the satisfaction of that jury that he had such intent then, even though

he knew that his conduct would have the effect of directly impeding or impairing intelligence activities, he should be found not guilty. On the other hand, if the government can establish to the satisfaction of the jury that the defendant had such an intent, even if the jury believes he had some additional purposes, he should be found guilty.

To be subject to prosecution under section 601(c), one who discloses the identity of a covert agent must specifically intend that the impairing or impeding be the result of the identification and disclosure. For example, the discloser might intend, among other things, the expulsion of the agent by the foreign government, his arrest, the refusal of his assets" to work with him, or the recall of the individual by the CIA because his cover has been compromised. On the other hand, one who seeks to indirectly influence the activities of covert agents merely by influencing public debate in the United States or urging executive or legislative action is beyond the reach of this section.

In testimony before this Committee, the Administration witnesses testified as follows:

> Mr. CASEY. Mr. Chairman, I understand that the Department of Justice believes that the Senate version of the bill captures the concerted nature of the activity which is intended to be proscribed than does the House bill, and that there are prosecutorial and evidentiary advantages to the Senate language. I believe the Department's witness will speak to this matter. (Transcript of Subcommittee on Security and Terrorism Hearing on S. 391, May 8, 1981, at p. 47.)
>
> * * * * * * *
>
> Mr. WILLARD. We also believe that the objective standard of "intent" in Section 601(c) would pass constitutional muster under a First Amendment or due process challenge. We believe that this standard is preferable to the specific "intent" standard contained in the current House version of this legislation, Section 601(c) of H.R. 4. (Transcript of Subcommittee on Security and Terrorism Hearing on S. 391, May 8, 1981, at p. 59.)

The following exchange then occurred between Senator Biden and Mr. Willard:

> Mr. WILLARD. Senator, as I testified before the House Intelligence Committee, the Department of Justice would support either bill. We have a preference for the wording of S. 391 as it stands now. We think either bill would be a great improvement over the present situation, and both bills would be held constitutional and would be enforceable. (Transcript of Subcommittee on Security and Terrorism Hearing on S. 391, May 8, 1981, at p. 80.)
>
> * * * * * * *
>
> Senator BIDEN. * * * let me be sure I understand. You would not oppose—you would support either version. You prefer the Senate version, but you would support either version? Is that correct? (Transcript of Subcommittee on Security and Terrorism Hearing on S. 391, May 8, 1981, at p. 89.)
>
> Mr. WILLARD. That is correct, Senator.

Mr. Willard stated at the conclusion of the Committee's adoption of the Biden amendment that the bill is both "enforceable and constitutional." (The Washington Post, Wednesday, October 7, 1981, at p. A3.)

SECTION 602—DEFENSE AND EXCEPTIONS

Section 602(a) states that:

> It is a defense to a prosecution under section 601 that before the commission of the offense with which the defendant is charged, the United States had publicly acknowledged or revealed the intelligence relationship to the United States of the individual the disclosure of whose intelligence relationship to the United States is the basis for the prosecution.

The words "publicly acknowledged" are intended to encompass such public activities as official publications of the United States, or official statements or press releases made by those acting on behalf of the United States, which specifically acknowledge an intelligence relationship. The United States has "revealed" an intelligence relationship if it has disclosed information which names, or leads directly to the identification of, an individual as a covert agent. Information does not lead directly to such an identification if the identification can be made only after an effort to seek out and compare, cross-reference, and collate information from several publications or sources which in themselves evidence an effort by the United States to conceal this identity.

Section 601(b)(1) and (2) ensure that a prosecution cannot be maintained under section 601(a), (b), or (c), upon theories of aiding and abetting, misprision of a felony, or conspiracy, against an individual who does not actually disclose information unless the government can meet the proof requirement of section 601(c). A reporter to whom is disclosed, illegally, the identity of a covert agent by a person prosecutable under section 601(a) or (b) would most likely not be engaging in the requisite course of conduct, because he would not likely be engaged in an effort to expose covert agents without more of a showing of the necessary intent.

Section 602(c) is intended to make clear that disclosures made directly to the House or Senate Intelligence Committees are not criminal offenses.

Section 602(d) states that "it shall not be an offense under section 601 for an individual to disclose information that solely identifies himself as a covert agent." The word "solely" is intended to make clear that such an individual cannot be subject to the penalties of section 601 simply on the grounds that he revealed his own identity as a covert agent.

Of course, this provision does not relieve the individual from any other agreements or obligations he may have incurred.

SECTION 603—PROCEDURES FOR ESTABLISHING COVER FOR INTELLIGENCE OFFICERS AND EMPLOYEES

Section 603 requires the President to establish procedures to ensure that undercover intelligence officers and employees receive effective cover. To this end, the section also stipulates that the procedures shall provide that those departments and agencies of the government, other

than the Peace Corps, designated by the President to provide assistance for cover arrangeemnts shall provide whatever assistance the President deems necessary to effectively maintain the secrecy of such officers and employees.

This provision of the bill does not stipulate which elements of government shall provide assistance or what that assistance must be. Such procedures are exempted from any requirement for publication or disclosure. The Committee is not addressing in this provision the relationships between intelligence agencies and private organizations or institutions.

SECTION 604—EXTRATERRITORIAL JURISDICTION

This section is intended to remove any doubt of the Congress' intent to authorize the federal government to prosecute a United States citizen or permanent resident alien for an offense under section 601 committed outside the United States.

SECTION 605—PROVIDING INFORMATION TO CONGRESS

This section is intended to make clear that no provision of the legislation authorizes the Executive branch to withhold information from the Congress.

SECTION 606—DEFINITIONS

Section 606(1) defines "classified information." It means identifiable information or material which has been given protection from unauthorized disclosure for reasons of national security pursuant to the provisions of a statute or executive order.

Section 606(2) defines "authorized." When used with respect to access to classified information it means having authority, right, or permission pursuant to the provisions of a statute, executive order, directive of the head of any department or agency engaged in foreign intelligence or foreign counterintelligence activities, order of any United States court, or the provisions of any rule of the House of Representatives or resolution of the Senate which assigns responsibility within the respective House of Congress for the oversight of intelligence activities.

Thus, the bill would not impose criminal penalties for disclosures made pursuant to a federal court or to either of the intelligence oversight committees, or for disclosures otherwise authorized by statute, executive order, or departmental directive.

Section 606(3) defines "disclose." It means to communicate, provide, impart, transmit, transfer, convey, publish or otherwise make available.

Section 606(4) defines "covert agent." The term encompasses three distinct groups. In the first group are officers or employees of (or members of the Armed Forces assigned to) an intelligence agency whose identities are classified and who are serving outside the United States at the time of the disclosure or have so served within the previous five years.

In the second group are U.S. citizens in the United States who are agents or informants of the foreign counterintelligence or foreign counterterrorism components of the FBI, or U.S. citizens outside the U.S. who are agents of, or informants or sources of operational assistance to an intelligence agency. In each instance the intelligence rela-

tionship must be classified. Domestic agents and informants of the CIA or the Department of Defense are not included within the definition.

In the third group are present or former agents of an intelligence agency and informants or sources of operational assistance to an intelligence agency whose identities are classified and who are not U.S. citizens.

The Committee intends the term "agent" to be construed according to traditional agency law. Essentially, an agent is a non-employee over whom is exercised a degree of direction and control. A "source of operational assistance," on the other hand, is a non-employee who is not necessarily subject to direction and control, but who supports or provides assistance to activities which are under direction and control.

Section 606(5) defines "intelligence agency." It means the Central Intelligence Agency, any foreign intelligence component of the Department of Defense, or the foreign counterintelligence or foreign counterterrorism components of the FBI.

Section 606(6) defines "informant." It means any individual who furnishes information to an intelligence agency in the course of a confidential relationship protecting the identity of such individual from public disclosure. This definition, along with that of "covert agent," ensures that the term "informant" does not include all possible sources of assistance or information, but is narrowly defined to bring within it a limited number of individuals whose identity is classified and whose relationships with an agency are or have been part of an established foreign intelligence, foreign counterintelligence, or foreign counterterrorism collection operation or program.

Section 606(7) defines "officer" and "employee" with the definition given such terms by section 2104 and 2105, respectively, of title 5, United States Code.

Section 606(8) defines "Armed Forces" to mean the Army, Navy, Air Force, Marine Corps, and Coast Guard.

Section 606(9) defines "United States." When used in a geographic sense it means all areas under the territorial sovereignty of the United States and the Trust Territory of the Pacific Islands.

Section 606(10) states that "the term 'pattern of activities' requires a series of acts with a common purpose or objective." This ensures, among other things, that an isolated disclosure not part of a pattern of activities intended to identify and expose is not subject to the penalties in section 601(c). A pattern of activities cannot be random acts, but must be part of a systematic effort to identify and expose identities of covert agents.

Cost of Legislation

In compliance with paragraph 11(a) of Rule XXVI of the Standing Rules of the Senate, the Committee estimates that there will be little or no cost as a result of the passage of this bill.

Evaluation of Regulatory Impact

In accordance with rule XXVI of the Standing Rules of the Senate, the Committee finds that, with the possible exception of section 603(a), no regulatory impact will be incurred in implementing the provisions of this legislation.

In accordance with rule XXVI(11)(b) (1) and (2) of the Standing Rules of the Senate, the Committee finds that it is impracticable to comply with the requirement for an evaluation of the regulatory impact of section 603(a) of this legislation for the following reasons:

(1) Section 603(a), concerning "Procedures for Establishing Cover for Intelligence Officers and Employees," provides that the President shall establish such procedures as the President determines are necessary to provide effective cover for intelligence officers and employees. The provision itself neither establishes such procedures nor requires the President to change existing procedures. Thus it is not possible for the Committee to determine whether the President will in fact establish new procedures for cover, or, in the event new procedures are established, what the regulatory impact of such new procedures might be.

(2) The Committee is therefore unable to evaluate the impact of the provision in terms of the number of individuals who may be affected, the economic impact of any new procedures, the impact on the personal privacy of the individuals concerned, or the additional paperwork which might result from new procedures.

Changes in Existing Law Made by the Bill

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in the existing law made by the bill, as reported, are shown as follows (new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

(61 Stat. 497) Chapter 343

AN ACT to promote the national security by providing for a Secretary of Defense; for a National Military Establishment; for a Department of the Army, a Department of the Navy, and a Department of the Air Force; and for the coordination of the activities of the National Military Establishment with other departments and agencies of the Government concerned with the national security

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

That this Act may be cited as the "National Security Act of 1947."

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TITLE VI—PROTECTION OF CERTAIN NATIONAL SECURITY INFORMATION

PROTECTION OF IDENTITIES OF CERTAIN UNITED STATES UNDERCOVER INTELLIGENCE OFFICERS, AGENTS, INFORMANTS AND SOURCES

SEC. 601. (a) Whoever, having or having had authorized access to classified information that identifies a covert agent, intentially discloses any information identifying such covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined not more than $50,000 or imprisoned not more than ten years, or both.

(b) Whoever, as a result of having authorized access to classified information, learns the identity of a covert agent and intentionally discloses any information identifying such covert agent to any individual not authorized to receive classified information, knowing that the information disclosed so identifies such covert agent and that the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States, shall be fined not more than $25,000 or imprisoned not more than five years, or both.

(c) Whoever, in the course of an effort to identify and expose covert agents with the intent to impair or impede the foreign intelligence activities of the United States by the fact of such identification and exposure, discloses to any individual not authorized to receive classified information, any information that identifies an individual as a covert agent, knowing that the information disclosed so identifies such individual and that the United States is taking affirmative measures to conceal such individual's classified intelligence relationship to the United States, shall be fined not more than $15,000 or imprisoned not more than three years, or both.

DEFENSES AND EXCEPTIONS

SEC. 602.(a)It is a defense to a prosecution under section 601 that before the commission of the offense with which the defendant is charged, the United States had publicly acknowledged or revealed the intelligence relationship to the United States of the individual the disclosure of whose intelligence relationship to the United States is the basis for the prosecution.

(b)(1) Subject to paragraph (2), no person other than a person committing an offense under section 601 shall be subject to prosecution under such section by virtue of section 2 or 4 of title 18, United States Code, or shall be subject to prosecution for conspiracy to commit an offense under such section.

(2) Paragraph (1) shall not apply in the case of a person who acted in the course of a pattern of activities intended to identify and expose covert agents and with reason to believe that such activities would impair or impede the foreign intelligence activities of the United States.

(c) It shall not be an offense under section 601 to transmit information described in such section directly to the Select Committee

on Intelligence of the Senate or to the Permanent Select Committee on Intelligence of the House of Representatives.

(d) It shall not be an offense under section 601 for an individual to disclose information that solely identifies himself as a covert agent.

PROCEDURES FOR ESTABLISHING COVER FOR INTELLIGENCE OFFICERS AND EMPLOYEES

SEC. 603. (a) The President shall establish procedures to ensure that any individual who is an officer or employee of an intelligence agency, or a member of the Armed Forces assigned to duty with an intelligence agency, whose identity as such an officer, employee, or member is classified information and which the United States takes affimative measures to conceal is afforded all appropriate assistance to ensure that the identity of such individual as such an officer, employee, or member is effectively concealed. Such procedures shall provide that any department or agency, other than the Peace Corps, designated by the President for the purposes of this section shall provide such assistance as may be determined by the President to be necessary in order to establish and effectively maintain the secrecy of the identity of such individual as such an officer, employee, or member.

(b) Procedures established by the President pursuant to subsection (a) shall be exempt from any requirement for publication or disclosure.

EXTRATERRITORIAL JURISDICTION

SEC. 604. There is jurisdiction over an offense under section 601 committed outside the United States if the individual committing the offense is a citizen of the United States or an alien lawfully admitted to the United States for permanent residence (as defined in section 101(a)(20) of the Immigration and Nationality Act).

PROVIDING INFORMATION TO CONGRESS

SEC. 605. Nothing in this title shall be construed as authority to withhold information from Congress or from a committee of either House of Congress.

DEFINITIONS

SEC. 606. For the purpose of this title:

(1) The term "classified information" means information or material designated and clearly marked or clearly represented, pursuant to the provisions of a statute or Executive order (or a regulation or order issued pursuant to a statute or Executive order), as requiring a specific degree of protection against unauthorized disclosure for reasons of national security.

(2) The term "authorized," when used with respect to access to classified information, means having authority, right, or permission pursuant to the provisions of a statute, Executive order, directive of the head of any department or agency engaged in foreign intelligence or counterintelligence activities, order of any United States court, or provisions or any Rule of the House of

Representatives or resolution of the Senate which assigns responsibility within the respective House of Congress for the oversight of intelligence activities.

(3) The term "disclose" means to communicate, provide, impart, transmit, transfer, convey, publish, or otherwise made available.

(4) The term "covert agent" means—

(A) an officer or employee of an intelligence agency or a member of the Armed Forces assigned to duty with an intelligence agency,

(i) whose identity as such an officer, employee, or member is classified information, and

(ii) who is serving outside the United States or has within the last five years served outside the United States, or

(B) a United States citizen whose intelligence relationship to the United States is classified information and

(i) who resides and acts outside the United States as an agent of, or informant or source of operational assistance to, an intelligence agency, or

(ii) who is at the time of the disclosure acting as an agent of, or informant to, the foreign counter-intelligence or foreign counterterrorism components of the Federal Bureau of Investigation, or

(C) an individual, other than a United States citizen, whose past or present intelligence relationship to the United States is classified information and who is a present or former agent of, or a present or former informant or source of operational assistance to, an intelligence agency.

(5) The term "intelligence agency" means the Central Intelligence Agency, a foreign intelligence component of the Department of Defense, or the foreign counterintelligence or foreign counterterrorism components of the Federal Bureau of Investigation.

(6) The term "informant" means any individual who furnishes information to an intelligence agency in the course of a confidential relationship protecting the identity of such individual from public disclosure.

(7) The terms "officer" and "employee" have the meanings given such terms by section 2104 and 2105, respectively, of title 5, United States Code.

(8) The term "Armed Forces" means the Army, Navy, Air Force, Marine Corps, and Coast Guard.

(9) The term "United States", when used in a geographic sense, means all areas under the territorial sovereignty of the United States and the Trust Territory of the Pacific Islands.

(10) The term "pattern of activities" requires a series of acts with a common purpose or objective.

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